88-1801

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHNNY BINDER,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether due process is offended where the trial court denies a defendant an evidentiary hearing on the issue of bond pending appeal when he bears the burden of proving by clear and convincing evidence that:

1) He is not likely to flee;

2) He does not pose a danger to society; and

3) His appeal is not for purposes of delay, but raises a substantial question of law or fact likely to result in reversal or new trial.

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WHETHER DUE PROCESS IS OFFENDED WHERE THE TRIAL COURT DENIES A DEFENDANT AN EVIDENTIARY HEARING ON THE ISSUE OF BOND PENDING APPEAL WHEN HE BEARS THE BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT HE IS NOT LIKELY TO FLEE; DOES NOT POSE A DANGER TO SOCIETY; AND THAT HIS APPEAL IS NOT FOR PURPOSES OF DELAY BUT RAISES A SUBSTANTIAL QUESTION OF LAW OR FACT LIKELY TO RESULT IN REVERSAL OR NEW TRIAL.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHNNY BINDER, Petitioner

VS.

THE UNITED STATES OF AMERICA, Respondent

PETITION OF WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OPINION BELOW

United States v. Binder, No. 88-1685 (5th Cir.) (delivered 1-20-89) is the unreported order of which review is sought in this Court. See A-13.

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1. Appendix citations will be referred to as "A.- _____."

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case pursuant to 28 U.S.C. § 1291. The panel's order was entered on January 20, 1989. The Petitioner's Suggestion for Rehearing En Banc was timely filed on February 3, 1989, an was denied by the court on February 17, 1989. See A-96. Consistent with this Honorable Court's Rule 20, this petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254.

QUESTION PRESENTED (RESTATED)

Whether due process is offended where the trial court denies a defendant an evidentiary hearing on the issue of bond pending appeal when he bears the burden of

proving by clear and convincing evidence that (1) he is not likely to flee; (2) he does not pose a danger to society; and (3) his appeal is not for purposes of delay, but raises a substantial question of law or fact likely to result in reversal or new trial.

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the united States Constitution provides in pertinent part that "No person shall ... be deprived of life, liberty, or property without due process of law..."

STATUTORY PROVISION AT ISSUE

18 U.S.C. § 3143(b) provides that:

> **Release or detention pending appeal by the defendant.**
>
> "The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of

imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds--

> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any person or the community if released under Section 3142(b) or (c) of this title; and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely

> to result in reversal, or order for a new trial, or a sentence that does not include a term of imprisonment.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with Section 3142(b) or (c) of this title."

STATEMENT OF THE CASE

On December 11, 1987, the Petitioner was indicted by a federal grand jury in the Southern District of Texas for the offenses of conducting a continuing criminal enterprise, conspiracy to possess a controlled substance with the intent to distribute, delivery of a controlled substance possession of a controlled substance with the intent to distribute, maintaining a manufacturing facility, and conspiracy to defraud the Government.

The Petitioner voluntarily surrendered on December 16, 1987, and after a two day hearing, United States Magistrate Lingo Platter found that the Petitioner was not likely to flee and did not pose a danger to the community. The Petitioner was released on a $500,000.00 bond with 10% posed by a surety.

The Petitioner's trial began on July 7, 1988, and concluded on September 28, 1988. The jury convicted the Petitioner of delivery of a controlled substance and maintaining a place for the purpose of manufacturing or using a controlled substance. The jury acquitted the Petitioner of all other charges.

On December 19, 1988, the Petitioner was sentenced to a term of twenty years on each count, to be served consecutively, as well as a total fine of $200,000.00, and a special parole term of three years.

Immediately after the trial court imposed sentence, the Petitioner made an oral motion for bond pending appeal which was denied by the trial court. The Petitioner informed the court that numerous witnesses were present to testify so that the Petitioner could meet his

burden under 18 U.S.C. § 3143(b)(1). The trial court summarily denied this request without according the Petitioner an evidentiary hearing. The Petitioner then informed the court that he wished to make the required proffer of those grounds for appeal that would result in a reversal or new trial if decided in his favor consistent with 18 U.S.C. § 3143(b)(2). The court also summarily denied this request without according the Petitioner an evidentiary hearing.

On December 20, 1988, the Petitioner entered written notice of appeal on record. See A-3.

On December 21, 1988, the trial court issued written Findings of Fact and Conclusions of Law Regarding Detention Pending Appeal. See A-5. The court found, **inter alia**, that testimony from

"any additional character witnesses would be cumulative of evidence which already exists in ample quantity in the record." **Id.** The remainder of the court's "findings" dealt with the Petitioner's failure to meet his burden by clear and convincing evidence as required by 18 U.S.C. § 3143(b)(1)(2).

On December 20, 1988, the Petitioner filed his appeal of the trial court's denial of bond pending appeal. See A-11. On January 20, 1989, a panel of the Fifth Circuit denied this request. See A-13. The Petitioner's Suggestion for Rehearing En Banc was denied by the Fifth Circuit on February 17, 1989. See A-14.

REASONS FOR REVIEW

In holding that the failure of the district court to accord the Petitioner an evidentiary hearing on the issue of bail pending appeal did not offend due process, the Fifth Circuit rendered a decision in conflict with this Honorable Court's holdings in **Goldberg v. Kelly**, 90 S.Ct. 1011 (1970); **Morrisey v. Brewer**, 92 S.Ct. 2593 (1972); and **Gagnon v. Scarpelli**, 93 S.Ct. 1756 (1973). See U.S. Supreme Court Rule 17(.1)(c).

The Fifth Circuit's holding also "decided an important question of federal law which has not been, but should be, settled by this Court," see Rule 17 (.1)(c), **supra**, to-wit: whether a defendant who bears the burden of proof to show his eligibility for bail pending appeal pursuant to 18 U.S.C. § 3143(b),

may be denied an evidentiary hearing without due process being denied.

Either reason provides a compelling basis for this Court to grant the instant Petition for Writ of Certiorari.

ARGUMENT

A. THE DECISION TO DENY THE PETITIONER BAIL PENDING APPEAL IMPLICATES THE DUE PROCESS CLAUSE

This Court has held that whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." **Morrisey v. Brewer**, **supra**, at 2600. The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Due Process Clause. **Fuentes v. Shevin**, 92 S.Ct. 1983 (1972).

With this in mind, it is at once clear that the petitioner had an unquestioned liberty interest in the district court's decision to deny bail pending appeal. Indeed, it is difficult to imagine any element of the criminal

justice system which contemplates a defendant's liberty interest more than the determination of whether bail should be granted.

Although an accused may be denied bail and detained prior to trial, the dictates of 18 U.S.C. § 3142 require that a detention hearing be held at which time both sides may present evidence as to whether the accused is a flight risk or a danger to the community. That the Due Process Clause would be offended by the commitment of an accused to custody prior to trial without resort to an evidentiary hearing is beyond peradventure. It is instructive to note that in the present case, the magistrate who presided over the Petitioner's two day pre-trial detention hearing concluded that the latter posed neither a danger to the community nor a

flight risk.

The clear import of § 3142, supra, provides that the defendant may not be released pending appeal unless he shoulders the burden of proof as to the trio of requisites contained in this statutory provision. Having created these requisites for release, it would be wholly improbable that Congress would intend to deprive the defendant due process by permitting the denial of a hearing at which time he is statutorily duty-bound to present evidence to shoulder this burden.

That the district court's decision to deny bail to a defendant pending appeal squarely implicates the Due Process Clause is buttressed by this Honorable Court's prior decisions in **Morrisey v. Brewer**, **supra**; and **Gagnon v. Scarpelli**, **supra**. In **Morrisey**, this Court held that the Due

Process Clause requires a State to afford an individual some opportunity to be heard prior to revoking his parole. Writing for the majority, then Chief Justice Burger noted that:

> "We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal."

92 S.Ct. 2593, at 2601.

In **Gagnon v. Scarpelli**, **supra**, this Court held that the Due Process Clause required that a previously sentenced probationer be entitled to a hearing before his probation can be revoked. While noting that probation revocation, like parole revocation, is not a stage of a criminal prosecution, this Court held that such revocation does result in a loss of liberty and therefore implicates due process considerations. Id. at 1759-1760.

B. THE TRIAL COURT'S REFUSAL TO ACCORD THE PETITIONER AN EVIDENTIARY HEARING VIOLATES THE DUE PROCESS CLAUSE

Having made it manifest that the Due Process Clause is implicated insofar as the trial court's decision to deny bail pending appeal is concerned, the next inquiry is what degree of process is due.

This Court has long held that the fundamental requisite of due process of

law is the opportunity to be heard. **Grannis v. Ordean**, 34 S.Ct. 779, 783 (1914). The hearing must be at a meaningful time and a meaningful manner. **Armstrong v. Manzo**, 85 S.Ct. 1187, 1191 (1965). As this Court noted in **Goldberg v. Kelly**, **supra**, at 1020:

> "[I]n the present context, these principles require that a [welfare] recipient have timely and adequate notice detailing the reasons for a proposed termination [of benefits], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."

The logic of this Court's holding in **Goldberg v. Kelly**, **supra**, is no less

compelling in the context of the Petitioner's case where he has been denied the opportunity to both confront those adverse witnesses ostensibly forming the basis for the trial court's "findings," see **infra**, as well presenting his own evidence and arguments so that an adequate record for appellate purposes might be made.

It is axiomatic that had the trial court admitted the Petitioner to bail pending appeal, that due process would have mandated that the latter be given notice and a hearing in the event the Government sought to revoke that bail. See e.g., **United States v. Bowdach**, 561 F.2d 1160 (5th Cir. 1977). Indeed in **Bowdach**, a decision which the panel of the Fifth Circuit ostensibly ignored in rejecting the Petitioner's request below,

the Fifth Circuit sanctioned the temporary ex parte revocation of the defendant's bail pending appeal only because it was followed by notice and an evidentiary hearing. Id. at 1167.

The Fifth Circuit's holding that the Petitioner is not entitled to due process during the initial determination of whether bail pending appeal is to be granted while at the same time concluding that due process would apply if bail was granted and then subsequently revoked is quite simply, wide of the mark and inconsistent with any rational understanding of what the Due Process Clause means.

C. THE TRIAL COURT'S FINDINGS IGNORE THE VERY REASONS WHY AN EVIDENTIARY HEARING WAS REQUIRED IN THIS CASE

The trial court premised its denial of an evidentiary hearing in the instant case on the fact that "[D]uring the trial the court heard from a number of witnesses who testified on behalf of the defendant[.]" and "that any additional character witnesses would be cumulative of evidence which already exists in ample quantity in the record." See A-5. Without stating how or why the Petitioner failed to meet the burdens imposed upon him by 18 U.S.C. § 3143(b), the trial court then summarily concluded that the Petitioner be detained pending appeal in the instant case. See A-5.

The infirmity in these findings is at once evident. Those witnesses to whom the trial court made reference as having

testified on the Petitioner's behalf at trial were not concerned with the issues of either the Petitioner's flight risk or danger to the community. Their testimony was directed at refuting the allegations contained in the indictment and indeed, any references they might have made to the area of flight risk or danger to society would have either been objectionable or certainly ill-advised from defense counsel's standpoint. The same thing is true with respect to the Government's parade of witnesses. Any factual finding by the trial court that the Petitioner did not sustain his burden consistent with § 3143(b) solely on the basis of the Government's witnesses at trial would have been at best inferentially speculative and at worst, unsupported by their testimony.

This Court has long held that in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. **Goldberg v. Kelly**, **supra**, at 1021. Noting that "[W]hat we said in **Greene v. McElroy**, 79 S.Ct. 1400, 1413 (1959), is particularly pertinent" in matters involving due process concerns, this Court pointed out that:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, **the evidence used to prove the Government's**

case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots."

[Emphasis added].

Simply stated, the trial court's factual findings were premised on Government witnesses who never testified about much less were cross-examined on the issues of the Petitioner's flight risk or danger to the community. Moreover, the Petitioner was denied the opportunity to dispel whatever sentiments the trial court may have harbored as a result of listening to the Government's parade of unindicted co-conspirators, cooperating co-defendants, and federal agents by at least calling his own witnesses, witnesses whose testimony would have been limited specifically to the dictates of § 3143(b), **supra**, so that the issue would have been both narrowed and preserved for appellate review to determine whether the trial court's eventual findings were clearly erroneous.

The only apparent justification for the trial court's conduct was expediency. The denial of an evidentiary hearing in the case at bar simply cannot be reconciled without traditional notions of what the Due Process Clause has come to mean. Unless this Court is prepared to carve out a portion out of the Due Process Clause as it relates to the liberty interest of bond pending appeal, it is respectfully contended that the order of the Fifth Circuit in the instant case cannot stand and that this Court must grant this Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Write of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals and remand this cause to the district court with directions to grant the Petitioner an evidentiary hearing on the issue of bond pending appeal.

Respectfully submitted,

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Counsel of Record
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Houston, TExas 77002
(713)524-9922

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(713)228-8500

ATTORNEYS FOR PETITIONER

NOTARIZED STATEMENT OF MAILING AND CERTIFICATE OF SERVICE

BEFORE ME, the undersigned authority this date personally appeared BRIAN W. WICE who stated upon his oath that:

"My name is Brian W. Wice. I am a member of the bar of the United States Supreme Court. I personally mailed within the time allowed for filing, the original and forty true copies of the foregoing Petition for Writ of Certiorari and its Appendix, to the Clerk of the United States Supreme Court by depositing them in the United States mail at Houston, Texas, postage pre-paid. I have on this date served upon all parties required to be served true copies of the foregoing Petition for Writ of Certiorari and its Appendix by depositing them in the United States mail at Houston, Texas, postage pre-paid and addressed to:"

Henry K. Oncken
United States Attorney
Southern District of Texas
P.O. Box 61129
Houston, TX 77208
[One copy]

William Bryson
Acting Solicitor General
Dept. of Justice
10th St. & Constitution Ave.
Washington, D.C. 20530
[Three copies]

Johnny Binder
[One copy]

BRIAN W. WICE
Affiant

SUBSCRIBED AND SWORN to before me this 27th day of April, 1989.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHNNY BINDER,
Petitioner

VS.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	H-87-314-(02)
JOHNNY BINDER	§	

NOTICE OF APPEAL

TO THE HONORABLE DAVID HITTNER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

NOW COMES, **Johnny Binder**, Defendant in the above styled and numbered cause, and files this notice appealing the judgment of conviction in this case and the sentencing entered in this case on December 19, 1989.

Respectfully submitted,

/s/ Kent A. Schaffer
KENT A. SCHAFFER
Admission No. 3603
3000 Texas Commerce Tower
Houston, Texas 77002
(713)228-8500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal has been delivered to AUSA Mel Pechacek, on the 20th day of December, 1988.

/s/ Kent A. Schaffer
KENT A. SCHAFFER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. H-87-314(02)
JOHNNY BINDER	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DETENTION PENDING APPEAL

Pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure and Title 18, United States Code, Sections 3141(b) and 3143(b), the District Court has considered Defendant's request for release after a judgment of conviction. For the reasons set forth below, the Court has concluded that the Defendant should be detained pending appeal.

The Court shall order that a person who has been found guilty of a offense and sentenced to a term of imprisonment and

who has filed an appeal, be detained, unless the Court finds (1) by clear and convincing evidence that the Defendant is not likely to flee or pose a danger to the safety of any other person or the community if released; and (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for new trial, or a sentence that does not include a term of imprisonment. Title 18, United States Code, Sections 3143(b), (1) and (2).

I.

The Defendant was convicted by a jury on September 29, 1988 for aiding and abetting the delivery of cocaine and for maintaining a place for the purpose of manufacturing, distributing and using crack cocaine (cocaine base). The two

offenses occurred on December 17, 1986 and May 23, 1987, respectively, and involved two distinct aspects of the narcotics trade. The pre-trial services report prepared prior to trial and the presentence report prepared prior to sentencing revealed numerous arrests with one felony probation and numerous misdemeanor convictions over a lengthy period of time by this Defendant. The Court subsequently sentenced the Defendant on December 19, 1988 to a term of imprisonment of 20 years and a find of $100,000.00 on each count with the sentences being order to run consecutively.

The Court is aware that a pre-trial detention hearing occurred after the arrest of the Defendant at which time he presented numerous witnesses on his

behalf. The Court heard the entire trial which began on July 7, 1988, and concluded on September 29, 1988. During the trial the Court heard from a number of witnesses who testified on behalf of the Defendant. After conviction and after considering Defendant's Motion for Bail Pending Sentencing Request for Hearing, the pre-trial detention hearing and the testimony during trial, the Court ordered the Defendant detained pending sentence. The Defendant appealed his detention pending sentence to the Fifth Circuit Court of Appeals and it was denied on November 16, 1988 in Docket No. 88-6080. The Defendant requested a rehearing before the Fifth Circuit and it was denied on December 9, 1988.

Prior to the actual sentencing the Court reviewed various letters submitted

by different individuals on behalf of the Defendant. After sentence being pronounced, the Defendant gave his Notice of Appeal and mentioned that additional character witnesses were present. The Court states that any additional character witnesses would be cumulative of evidence which already exists in ample quantity in the record.

II.

The Court, after considering all facts, motions, objections, rulings, verdicts and sentences in this cause, pursuant to Title 18, United States Code, Section 3143(b), cannot find that (1) by clear and convincing evidence that Johnny Binder, Jr. is not likely to flee and does not pose a danger to the safety of any other person or the community; (2) Defendant's appeal is not for the purpose

of delay; (3) the appeal raises a substantial question of law or fact; and (4) if a substantial question of law or fact is determined favorable to the Defendant on appeal, it is likely to result in reversal or an order for a new trial, or a sentence that does not include a term of imprisonment.

It is hereby ordered that Johnny Binder, Jr. be detained pending appeal of judgment of conviction in this cause.

DONE in Houston, Texas this 21st day of December, 1988.

/s/ David Hittner
DAVID HITTNER
United States District Judge

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. H-87-314-(02)
JOHNNY BINDER	§	

NOTICE OF APPEAL

TO THE HONORABLE DAVID HITTNER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

NOW COMES, **Johnny Binder**, Defendant in the above styled and numbered cause, and files this notice appealing the Court's denial of bond pending appeal.

Respectfully submitted,

/s/ Kent A. Schaffer
KENT A. SCHAFFER
Admission No. 3603
3000 Texas Commerce Tower
Houston, Texas 77002
(713)228-8500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal has been delivered to AUSA Mel Pechacek, on the 20th day of December, 1988.

/s/ Kent A. Schaffer
KENT A. SCHAFFER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-6185
USDC No. CR-H-87-314(02)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHNNY BINDER,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Texas

- - - - - - - - - - - - -

O R D E R:

Johnny Binder's motion for release on bail pending appeal is DENIED. Binder has the burden of establishing by clear and convincing evidence that he is not likely

to flee or pose a danger to the community. 18 U.S.C. § 3142(b). Binder has not met his burden of proof. Accordingly, the motion is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT
JUDGE

NO. 88-6185

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

VS.

JOHNNY BINDER
Defendant-Appellant

Appealed from the
United States District Court
For the Southern District of Texas
Houston Division
Criminal Action No. 87-314-02

SUGGESTION FOR REHEARING EN BANC

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Johnny Binder

NO. 88-1685

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

VS.

JOHNNY BINDER
Defendant-Appellant

Appealed from the
United States District Court
For the Southern District of Texas
Houston Division
Criminal Action No. H-87-314-02

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Johnny Binder
Defendant-Appellant

Kent A. Schaffer
Attorney for Defendant - Appellant
Johnny Binder

Mel Pechacek
Assistant United States Attorney
Attorney for Plaintiff - Appellee
United States of America

Respectfully submitted,

/s/ Kent A. Schaffer
KENT A. SCHAFFER

Attorney of Record for
Defendant-Appellant
JOHNNY BINDER

STATEMENT OF COUNSEL

I express a belief, based on a seasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States, and that the consideration by the full Court is necessary to secure and maintain uniformity of decisions by this Court:

(1) United States v. Bowdach, 501 F.2d 1160 (5th Cir., 1977);

(2) Gagnon v. Scarpelli, 93 S.Ct. 1756 (1973); and

(3) Morrissey v. Brewer, 92 S.Ct. 2593 (1972).

I express a belief, based on a seasoned and studied professional judgment, that this appeal presents one or more questions of exceptional importance.

ISSUE PRESENTED:

WHETHER A DEFENDANT MAY BE DENIED AN EVIDENTIARY HEARING ON THE ISSUE OF BONDING PENDING APPEAL, WHEN HE HAS THE BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT:

(1) He is not likely to flee;

(2) He does not pose a danger to society; and

(3) His appeal is not for purposes of delay, but raises a substantial question of law or fact likely to result in reversal or new trial.

Respectfully submitted,

/s/ Kent A. Schaffer
KENT A. SCHAFFER
TBA NO. 17724300
ADMISSION NO. 3603
3000 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002
(713)228-8500

Attorney for Defendant-Appellant Johnny Binder

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STATEMENT OF ISSUES WHICH MERIT EN BANC CONSIDERATION

This appeal should be reheard en banc because the panel opinion is in conflict with the holding of the prior opinions in United States v. Bowdach, 501 F.2d 1160 (5th Cir., 1977), Gagnon v. Scarpelli, 93 S.Ct. 1756 (1973), and Morrissey v. Brewer, 92 S.Ct. 2593 (1972), as follows:

1. Morrissey v. Brewer, supra, held that a parolee was entitled to a hearing before his parole could be revoked. To deny him a hearing would deny him due process.

2. The Supreme Court in Gagnon v. Scarpelli, supra, held that before a probationer could have his probation revoked and have his liberty denied, he was entitled to a hearing.

3. This Court in United States v. Bowdach, supra, held that requirements of due process were satisfied if a defendant was given notice and a hearing before his bond pending appeal was revoked.

4. Title 18 U.S.C. § 3142(f) requires that a defendant be given a hearing before he can be detained.

The opinion issued by United States Circuit Judge Edith Jones denying the Defendant-Appellant's Motion for Release Pending Appeal upheld the District Court's denial of a hearing so that the Defendant-Appellant could not meet his burden of proof under 18 U.S.C. § 3143(b). This opinion is in conflict with the requirements of due process set forth in

Gagnon v. Scarpelli, supra, Morrissey v. Brewer, supra, and United States v. Bowdach, supra.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On December 11, 1987, the Defendant-Appellant was indicted by a federal grand jury for the offenses of conducting a continuing criminal enterprise, conspiracy to possess a controlled substance with the intent to distribute, delivery of a controlled substance, possession of a controlled substance with the intent to distribute, maintaining a manufacturing facility, and conspiracy to defraud the government.

The Defendant-Appellant voluntarily surrendered on December 16, 1987 and after a two day detention hearing, United States Magistrate Lingo Platter found that the Defendant-Appellant was not likely to flee and did not pose a danger to the community. The Defendant-Appellant was

released on a $500,000.00 bond with 10% posted by a surety.

The trial of this case commenced on July 7, 1988, and concluded on September 28, 1988. The jury convicted the Defendant-Appellant for delivery of a controlled substance and maintaining a place for the purpose of manufacturing or using a controlled substance.

On December 19, 1988, the Defendant-Appellant was sentenced to a term of twenty years on each count, to be served consecutively, as well as a total fine of Two Hundred Thousand Dollars ($200,000.00) and a special parole term of three years.

Immediately after the Court imposed the sentence, the Defendant-Appellant made an oral motion for bond pending appeal The Court denied the motion. The Defendant-Appellant informed the Court that numerous

witnesses were present to testify so that the Defendant-Appellant could meet his burden under Title 18 U.S.C. § 3143(b)(1), however the Court denied the Defendant-Appellant's request to present evidence. The Defendant-Appellant then informed the Court that he wished to make the required proffer of the grounds for appeal that would result in a reversal or new trial if decided in his favor, according to Title 18 U.S.C. § 3143(b)(2), however, the trial judge also denied this request.

On December 20, 1988, the Defendant-Appellant gave written notice of appeal.

On December 21, 1988, the Court issued Finding of Facts and Conclusions of Law Regarding Detention Pending Appeal (Exhibit A). The District Court Judge found, among other things, that testimony from "any additional character witness

would be cumulative of evidence which already exists in ample quantity in the record." The remainder of the "findings" dealt with the Defendant-Appellant's failure to meet his burden by clear and convincing evidence, as required by Title 18 U.S.C. § 3143(b)(1)(2).

On January 9, 1989, the Defendant-Appellant filed his appeal of the District Court's denial of bond pending appeal. On January 20, 1989, the Defendant-Appellant's appeal was denied (Exhibit B).

ISSUE PRESENTED FOR REHEARING

WHETHER A DEFENDANT MAY BE DENIED AN EVIDENTIARY HEARING ON THE ISSUE OF BONDING PENDING APPEAL, WHEN HE HAS THE BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT:

(1) He is not likely to flee;

(2) He does not pose a danger to society; and

(3) His appeal is not for purposes of delay, but raises a substantial question of law or fact likely to result in reversal or new trial.

ARGUMENT FOR REHEARING EN BANC

Title 18 U.S.C. § 3143(b) places the burden of proof on the Defendant-Appellant to show by clear and convincing evidence that:

1) he is not likely to flee;

(2) he does not pose a danger to the community; and

(3) there are substantial issues of law or fact that would result in acquittal or reversal if decided in the Defendant-Appellant's favor.

DEFENDANT-APPELLANT
NOT ALLOWED TO PRESENT EVIDENCE

The Defendant-Appellant, on appeal, complained of the District Court's failure to hold a hearing and provide him with an opportunity to meet his burden of proof. This Court failed to deal with this issue, merely finding that "Binder has not met his burden of proof", thus denying the appeal.

THIS COURT'S RULING IGNORES PRECEDENT

Rehearing En Banc is appropriate when the panel decision contains a precedent-setting error of exceptional public importance or directly conflicts with prior Supreme Court or Fifth precedent. Rule 35, Federal Rules of Appellate Procedure, Rule 35, Local Rules of the Fifth Circuit Court of Appeals.

Since Title 18 U.S.C. § 3143(b) places the burden of proof on the

Defendant-Appellant, the Defendant-Appellant is entitled to a hearing in the District Court so that he may meet that burden. The only way that the Defendant-Appellant could prove by clear and convincing evidence that he posed neither a flight risk or danger to the community was through a hearing where he could produce evidence through the many witnesses that were present at the time of sentencing. Despite the attempt of the Defendant-Appellant to produce clear and convincing evidence that he was not a flight risk or danger to the community and that he would raise substantial issues of law and fact on appeal that would result in a new trial or acquittal if decided in his favor, the District Court refused to hear any testimony on these issues. Affidavits from many of these witnesses

were supplied to this Court in the Defendant-Appellant's brief (Exhibit C). The Defendant-Appellant also framed the substantial issues on appeal in his Application for Bond Pending Appeal, filed with this Court.

This Court previously held in United States v. Bowdach, 561 F.2d 1160 (5th Cir., 1977), that before bond pending appeal can be revoked, the defendant must be given notice and a hearing. In Bowdach, the defendant was initially detained after conviction, however, after a hearing was granted bond pending appeal. The Government later sought to revoke the defendant's bond for violating his conditions of release. The defendant was arrested on a warrant and was temporarily detained. The bond was permanently revoked after a hearing. This Court

upheld the temporary detention and found:

> ". . . . an ex parte temporary revocation of an appeal bond is constitutional when followed by notice and hearing after the person has been brought into custody". Bowdach, at 1167.

Although Bowdach deals with the revocation rather than setting of bond pending appeal, the Defendant-Appellant certainly is entitled to no lesser degree of due process protection that had he first been admitted to bail.

In United States v. Farran, 611 F.Supp. 602 (S.D. Tex., 1985), affirmed 784 F.2d 1111, (cert. denied), 106 S.Ct. 2256, 476 U.S. 1144, United States District Judge Carl Bue noted that:

> ". . . where evidentiary requirements need to be met, a

hearing should be held".

Farran, at 605, note 1.

In Farran, the District Court found that the defendant posed neither a risk of flight nor danger to the community, however, denied bond because the defendant failed to make a showing that the issues on appeal would result in a new trial if decided in his favor. The Court did, however, recognize the right to a hearing on bond pending appeal, since the burden of proof is on the defendant.

See also, United States v. Horvath, 575 F.Supp. 516 (D. Minnesota, 1983). [Defendant may seek to meet burden of proof at a hearing on revocation of bond pending appeal by calling witnesses or by argument.]

It is abundantly clear that the law of this Circuit and this District provide

for a hearing before denial of bond, where the Defendant-Appellant is entitled to due process and is afforded the right to produce evidence so that he may meet his burden of proof, as required by 18 U.S.C. § 3143(b).

DENIAL OF DUE PROCESS

It is well settled that a defendant in a criminal case cannot be held without bail prior to trial unless it is determined after a detention hearing that he poses either a flight risk or danger to the community, 18 U.S.C. § 3142. [In the case at bar, a two day pre-trial detention hearing was held and at the conclusion, the Magistrate determined that the defendant posed neither a flight risk or danger to the community.]

A hearing is mandated before pre-trial detention clearly because to

detained the defendant without a hearing would be to deny him due process of law, under the Fifth Amendment of the United States Constitution. Since 18 U.S.C. § 3143 provides for bail pending appeal, once the defendant meets his burden of proof, there is no rational basis to believe that Congress intended to deny a defendant due process in an effort to thwart him in his attempt to meet that burden.

The United States Supreme Court has extended due process protection to probationers before their probation may be revoked, Gagnon v. Scarpelli, 93 S.Ct. 1756, 411 U.S. 617 (1973). This ruling came on the heels of Morrissey v. Brewer, 92 S.Ct. 2593, 408 U.S. 471 (1972), wherein the Court held that a parolee was entitled to two hearings prior to the

revocation of parole. The Court reasoned that since parole revocation dealt with the loss of liberty, the parolee was entitled to due process. In the parole revocation scenario, a probable cause hearing is required at the time of the parolee's arrest, and a second hearing prior to final revocation.

This Court further extended due process guarantees to defendants before their bond pending appeal could be revoked. See United States v. Bowdach, 561 F.2d 1160 (5th Cir., 1977), discussed supra.

The detention of the Defendant-Appellant pending appeal was ordered without giving him an opportunity to produce evidence that would allow him to meet his burden of proof under 18 U.S.C. § 3143(b). Accordingly, the denial of a

hearing amounted to the denial of due process that has been mandated by the Supreme Court, and this Circuit.

DEFENDANT COULD MEET BURDEN OF PROOF AS REQUIRED UNDER TITLE 18 U.S.C. § 3143(b)

The District Court denied the Defendant-Appellant a chance to produce evidence, reasoning that all evidence which the Defendant-Appellant could produce would merely be cumulative of what had already been produced at another time. This finding overlooked the fact that the District Court had never been presented with any evidence during earlier proceedings.

Had the Defendant-Appellant been permitted to present evidence, he could have presented a multitude of witnesses who could have shown that the Defendant-Appellant was not likely to flee, nor is he a danger to the community. These witnesses have known Johnny Binder at various stages during his life in Houston.

The Defendant-Appellant could have shown that he is married and has significant family ties in Houston. The Defendant-Appellant is gainfully employed as a music promoter and producer. He has had no felony convictions since a probated sentence for unauthorized use of a motor vehicle in 1971, (except for a 1979 robbery conviction for which the Defendant-Appellant was pardoned by the Governor of Texas in 1983, due to innocence). Each of the witness who were and are available to testify believe that the Defendant-Appellant is not a flight risk or danger to the community. Their beliefs are based upon their personal relationship with, and knowledge of the Defendant-Appellant.

This type of evidence could be offered to show that the Defendant-

Appellant does not pose a flight risk or danger to the community. Thus, the same showing could be made as was upheld by this Court in United States v. Jackson, 845 F.2d 1262 (5th Cir., 1988).

RECORD OF APPEARANCE AND FLIGHT

The Defendant-Appellant was released on bail shortly after arrest and spent approximately ten months on bail. During that time, he complied with all conditions of release and attended all court appearances promptly, including his approximately twelve week trial. Defendant-Appellant has never given the Court reason to fear that he would flee.

DANGER TO THE COMMUNITY OR OTHER PERSONS

There is nothing in the record to indicate that the Defendant-Appellant is a danger to the community or any other person (in fact, there is no record to

review since there was no hearing). Indeed, the District Court's Findings of Fact regarding Detention Pending Appeal is conspicuous for its absence of any evidence that Defendant-Appellant is a danger. Notably, the only possible argument for "danger" is the Defendant-Appellant's prior criminal record which includes seven (7) misdemeanor convictions. This record was known to the Magistrate during the pre-trial detention hearing and a finding was made at that time that the Defendant-Appellant did not pose a danger to the community or any other persons.

ISSUES ON APPEAL

The Defendant-Appellant has numerous issues of law and fact to raise on appeal that would result in a new trial or reversal if decided in his favor. These

issues are as follows:

1) The trial court erred in failing to declare a mistrial after the Defendant-Appellant objected to the Clerk of the Court (at the Judge's request) having communicated orally with the jury after the deliberations had begun. After days of deliberation, the Clerk of the Court entered the jury room to deliver a message from the Judge of said Court. The message, essentially, was that if the jury failed to return a verdict by the end of the following day (Friday), then they may have to work on Saturday. Said communication was not in response to a note from the

jury; was not reduced to writing for prior agreement by the parties; and was coercive in nature, designed solely to drive the jury to a verdict.[1]

2) The District Court erred in failing to quash the jury panel after the Government exercised its peremptory challenges based upon the race of the prospective juror. The actions of the Government were in clear violation of Batson v. Kentucky, 476 U.S. 79 (1986).

At the conclusion of the voir dire proceedings, the Defendant-Appellant objected to

---

[1]It should be noted that during the three months of trial, the jury was never asked to work on Saturday, prior to the start of deliberations.

the composition of the jury and moved to quash the jury as selected. A hearing was held on the Defendant-Appellant's Batson challenge and the Court denied the Defendant-Appellant's motion.

3) The trial court erred in failing to grant the Defendant-Appellant's motion for judgment of acquittal as to Count Twenty.

Count Twenty charged the Defendant-Appellant with maintaining a place for the purpose of using or manufacturing a controlled substance. The Court alleged that on or about May 23, 1987, the residence at 8515 Hearth #35 was used to manufacture or use a

controlled substance.

The evidence failed to show that any controlled substance was used or manufactured at 8515 Hearth #35, on or about May 23, 1987. The evidence showed only that cocaine was found inside the residence on May 23, 1987, however, there was no testimony that the cocaine was used or manufactured at that address.

Despite the allegation that the Defendant-Appellant possessed that particular cocaine, the jury acquitted him on that Count.

Count Twenty of the indictment was charged under Title 21 U.S.C. § 856(a), which makes illegal the ". . . opening

or maintaining of a place for the purpose of manufacturing, distributing, or use of a controlled substance."

The evidence at trial showed that the purpose of 8515 Hearth #35 was a residence for Cynthia Roberts. There was absolutely no evidence that on or about May 23, 1987, the purpose of this location changed from that of a residence to a manufacturing facility for cocaine. Even if one assumes the cocaine was manufactured at this location, on this day, this law would not permit conviction. The gravamen of § 856 is the "purpose of" the place which is maintained. The mere cooking or

using of the controlled substance at a location will not change the purpose of the residence, unless the intended use of the place is abandoned. The residence, 8515 Hearth #35, was a dwelling where Cynthia Roberts lived, for a period of at least two years. This is not the "fortified crack house" nor "drug laboratory", nor "shooting gallery" that was intended to be dealt with by § 856.

Either the proof is insufficient to sustain a verdict of guilt as to Count Twenty, or Title 21 U.S.C. § 856 is unconstitutional on its face due to vagueness,or it is being unconstitutionally applied in an

over-broad manner. Whatever the case, the issues presented are substantial and if decided in the Defendant-Appellant's favor, will result in a new trial of judgment of acquittal.

4) The trial court erred in failing to grant the Defendant-Appellant's motion for judgment of acquittal as to Count Eight.

Count Eight charged the Defendant-Appellant with delivery of a controlled substance. The proof showed that two co-defendants delivered one ounce of cocaine to an informant who turned it over to a DEA agent. The Defendant-Appellant was not present at the time of the delivery and the

informant was never called to testify as to any conversation that he may have had with the Defendant-Appellant. The Defendant-Appellant filed a motion for judgment of acquittal alleging insufficient evidence as to Count Eight.

None of the issues presented are frivolous.

CONCLUSION AND PRAYER

ACCORDINGLY, Defendant-Appellant respectfully prays that this Honorable Court withdraw the prior opinion and set this cause for rehearing en banc, and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

/s/ Kent A. Schaffer
KENT A.SCHAFFER
TBA NO. 17724300
ADMISSION NO. 3603
3000 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002
(713)228-8500

Attorney for Defendant-Appellant Johnny Binder

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Suggestion for Rehearing En Banc was delivered to the AUSA Mel Pechacek by hand delivery on this the 2nd day of February, 1989.

/s/ Kent A. Schaffer
KENT A. SCHAFFER

E X H I B I T

A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	H-87-314(02)
JOHNNY BINDER	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DETENTION PENDING APPEAL

Pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure and Title 18, United States Code, Sections 3141(b) and 3143(b), the District Court has considered Defendant's request for release after a judgment of conviction. For the reasons set forth below, the Court has concluded that the Defendant should be detained pending appeal.

The Court shall order that a person who has been found guilty of a offense and sentenced to a term of imprisonment and

who has filed an appeal, be detained, unless the Court finds (1) by clear and convincing evidence that the Defendant is not likely to flee or pose a danger to the safety of any other person or the community if released; and (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for new trial, or a sentence that does not include a term of imprisonment. Title 18, United States Code, Sections 3143(b), (1) and (2).

I.

The Defendant was convicted by a jury on September 29, 1988 for aiding and abetting the delivery of cocaine and for maintaining a place for the purpose of manufacturing, distributing and using crack cocaine (cocaine base). The two

offenses occurred on December 17, 1986 and May 23, 1987, respectively, and involved two distinct aspects of the narcotics trade. The pre-trial services report prepared prior to trial and the presentence report prepared prior to sentencing revealed numerous arrests with one felony probation and numerous misdemeanor convictions over a lengthy period of time by this Defendant. The Court subsequently sentenced the Defendant on December 19, 1988 to a term of imprisonment of 20 years and a find of $100,000.00 on each count with the sentences being order to run consecutively.

The Court is aware that a pre-trial detention hearing occurred after the arrest of the Defendant at which time he presented numerous witnesses on his

behalf. The Court heard the entire trial which began on July 7, 1988, and concluded on September 29, 1988. During the trial the Court heard from a number of witnesses who testified on behalf of the Defendant. After conviction and after considering Defendant's Motion for Bail Pending Sentencing Request for Hearing, the pre-trial detention hearing and the testimony during trial, the Court ordered the Defendant detained pending sentence. The Defendant appealed his detention pending sentence to the Fifth Circuit Court of Appeals and it was denied on November 16, 1988 in Docket No. 88-6080. The Defendant requested a rehearing before the Fifth Circuit and it was denied on December 9, 1988.

Prior to the actual sentencing the Court reviewed various letters submitted

by different individuals on behalf of the Defendant. After sentence being pronounced, the Defendant gave his Notice of Appeal and mentioned that additional character witnesses were present. The Court states that any additional character witnesses would be cumulative of evidence which already exists in ample quantity in the record.

II.

The Court, after considering all facts, motions, objections, rulings, verdicts and sentences in this cause, pursuant to Title 18, United States Code, Section 3143(b), cannot find that (1) by clear and convincing evidence that Johnny Binder, Jr. is not likely to flee and does not pose a danger to the safety of any other person or the community; (2) Defendant's appeal is not for the purpose

of delay; (3) the appeal raises a substantial question of law or fact; and (4) if a substantial question of law or fact is determined favorable to the Defendant on appeal, it is likely to result in reversal or an order for a new trial, or a sentence that does not include a term of imprisonment.

It is hereby ordered that Johnny Binder, Jr. be detained pending appeal of judgment of conviction in this cause.

DONE in Houston, Texas this 21st day of December, 1988.

/s/ David Hittner
DAVID HITTNER
United States District Judge

E X H I B I T

B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-6185
USDC No. CR-H-87-314(02)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHNNY BINDER,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Texas

- - - - - - - - - - - - -

O R D E R:

Johnny Binder's motion for release on bail pending appeal is DENIED. Binder has the burden of establishing by clear and convincing evidence that he is not likely

to flee or pose a danger to the community. 18 U.S.C. § 3142(b). Binder has not met his burden of proof. Accordingly, the motion is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT
JUDGE

E X H I B I T

C

AFFIDAVIT

My name is Bonnie J. Binder and I reside in Houston, Harris County, Texas. I am the Vice-President of Diamond Productions. I am over eighteen (18) years of age.

I have known Johnny Binder for approximately 2 1/2 years. Johnny and I have been married since December 14, 1987.

I am aware of Johnny's recent conviction and despite the sentence imposed, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon by knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

_____

BONNIE J. BINDER

SUBSCRIBED AND SWORN TO BEFORE ME on this the 6th day of January, 1989.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

_____

AFFIDAVIT

My name is Gerald P. Monks and I reside in Houston, Harris County, Texas. I am the owner of C.A.R.E Bail Bonds, located at 4189 Bellaire Blvd., #201, Houston, Texas. I am over eighteen (18) years of age.

I have known Johnny Binder for approximately two years. I helped arrange Johnny's $500,000.00 bail, which was set in this case.

I am aware of Johnny's recent conviction and, despite the sentence imposed, it is my opinion that if the bond is properly prepared, he will not pose a danger to the community or a risk of flight. The first condition being that the Surety can surrender him anytime the Surety feels he is in contact with drug persons, or fails to comply with

conditions set by the Surety. The Surety will not guarantee to make the bond under any conditions.

GERALD P. MONKS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 30th day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Grant U. Hardeway and I reside in Houston, Harris County, Texas. I am an attorney practicing in Houston and have been an attorney for 15 years. I am over eighteen (18) years of age.

I have known Johnny Binder and his family for approximately 15 years. I have handled various legal matters for Johnny Binder and his family.

On March 6, 1982, I picked Johnny Binder up at the Ellis Unit because he was granted a three day leave to attend his father's funeral. At the time of this release, Johnny was serving an 18 year sentence. On March 8, 1982, Johnny Binder returned himself to the Ellis Unit.

I am aware of Johnny's recent conviction and despite the sentenced imposed, it is my opinion that he does not

pose a danger to the community.

Furthermore, based upon my knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

_____
GRANT U. HARDEWARY

SUBSCRIBED AND SWORN TO BEFORE ME on this the 30th day of December, 1988.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

_____

AFFIDAVIT

My name is Bella Jo Fisher and I reside in Houston, Harris County, Texas. I am a court report in the 230th Judicial District Court for the Honorable Joe Kegans. I am over eighteen (18) years of age.

I have known Johnny Binder for approximately 10 years. My husband, who was a private investigator, was hired by Johnny Binder to do some investigative work in 1979, which was the time Johnny was accused and convicted of a crime he did not commit. Johnny was eventually pardoned for that crime.

I am aware of Johnny's recent conviction and despite the sentence imposed, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge

and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

_____
BELLA JO FISHER

SUBSCRIBED AND SWORN TO BEFORE ME on this the 30th day of December, 1988.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

_____

AFFIDAVIT

My name is Nathalia Binder. I reside at 5406 Burma in Houston, Harris County, Texas. I have been employed at Texas Instruments for over fifteen (15) years. I am fifty-three years of age.

I have known Johnny Binder all of his life as I am his mother.

I am well aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with my son, Johnny, it is my opinion that he does not pose a risk of flight.

_____

NATHALIA BINDER

SUBSCRIBED AND SWORN TO BEFORE ME ON the 23rd day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

_____

AFFIDAVIT

My name is Sonseria Binder Allen and I reside in Houston, Harris County, Texas.

I am one of Johnny Binder's sisters and I have known him all his life.

I am aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with my brother, Johnny, it is my opinion that he does not pose a risk of flight.

SONERIA BINDER ALLEN

SUBSCRIBED AND SWORN TO BEFORE ME ON the 30th day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Johnnie Walker and I reside in Houston, Harris County, Texas. I am sixteen (16) years of age and attend Jessie Jones Senior High School. Johnny Binder is my father.

I am aware of Johnny Binder's recent conviction and despite the sentence imposed upon him it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and my relationship with my father, Johnny Binder, it is my opinion that he does not pose a risk of flight.

_____

JOHNNIE WALKER

SUBSCRIBED AND SWORN TO BEFORE ME ON

the 25th day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

_____

AFFIDAVIT

My name is Rev. Johnnie J. Roberson and I reside in Houston, Harris County, Texas. I am the pastor of Mt. Hebron Missionary Baptist Church and have been for 30 years. I am 70 years of age.

I have known Johnny Binder and his family for over 27 years, as he and his family have been members of my church for over 27 years.

I am aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with Johnny Binder and his family, it is my opinion that he does not pose a risk of flight.

REV. JOHNNIE J. ROBERSON

SUBSCRIBED AND SWORN TO BEFORE ME ON the 25th day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

_____

AFFIDAVIT

My name is Marsha Flores and I reside in Houston, Harris County, Texas. I am employed at Texas Instruments and have been for 13 years. I am over eighteen (18) years of age.

I have known Johnny Binder since we were in grade school. We grew up together and we are both members of the Mt. Hebron Baptist Church. My family has ben good friends with the Binder family for over 30 years.

I am aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with Johnny, it is my

opinion that he does not pose a risk of flight.

MARSHA FLORES

SUBSCRIBED AND SWORN TO BEFORE ME ON the 6th day of January, 1989.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Mrs. Willie R. McDonald and I reside in Houston, Harris County, Texas. I am retired from the Houston Independent School District after 34 years of service as a teacher.

I have known Johnny Binder and his family for over 30 years.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

MRS. WILLIE R. MCDONALD

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Ivi Johnson and I reside in Houston, Harris County, Texas. I am employed as a school teacher for the Houston Independent School District and have been employed for four (4) years. I am 27 years of age.

I have known Johnny Binder for 27 years. We lived in the same neighborhood when we were growing up.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

_____

IVI JOHNSON

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Esther Augustine and I reside in Houston, Harris County, Texas. I am currently employed at Texas instruments and have been for approximately 20 years.

I have known Johnny Binder and his family for at least for 20 years. I work with his mother, Nathalia Binder, at Texas Instruments.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder and his family, it is my opinion that he does not pose a risk of flight.

_____

ESTHER AUGUSTINE

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Cheryl Ann Flores. I reside at 4830 Wilmington, #2 in Houston, Harris County, Texas. I am presently employed at CIGNA Corporation and I am also the Director of Choirs at the Mt. Hebron Baptist Church. I am 35 years of age.

I have known Johnny Binder for over 20 years as he is a member of the Mt. Hebron Baptist Church.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

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CHERYL ANN FLORES

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

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NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Beulah Phillips and I reside in Houston, Harris County, Texas with my husband, Lloyd Phillips. I am over eighteen (18) years of age.

My husband and I have known Johnny Binder and his family for over 20 years. The Binder children and my children grew up in the same neighborhood.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

_____

BEULAH PHILLIPS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Sylvia Ann Williams and I reside in Houston, Harris County, Texas. I am the secretary of Mt. Hebron Missionary Baptist Church and a Sunday school teacher. I am 33 years of age.

I have known Johnny Binder for over 20 years. I have been a close friend of his sister, Sonseria. The Binder family have been long time members of the Mt. Hebron Missionary Baptist Church.

I am aware of Johnny's conviction and despite the sentence imposed upon him by the Court, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

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SYLVIA ANN WILLIAMS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-6185

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CYNTHIA ROBERTS and
JOHNNY BINDER,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeals from the United States
District Court for the
Southern District of Texas

- - - - - - - - - - - - -

Before REAVLEY JONES and DUHE, Circuit Judges.

B Y T H E C O U R T :

IT IS ORDERED that the motion of appellant, Johnny Binder, for

reconsideration of this Court's order denying his motion for bail pending appeal is DENIED.

AFFIDAVIT

My name is Mrs. Lillian Cook Mitchell and I reside in Houston, Harris County, Texas. I am a member of Mt. Hebron Missionary Baptist Church and I am employed at the City of Houston Controller's office. I am over eighteen (18) years of age.

I have known Johnny Binder and his family for approximately 15 years. He and his family are members of the Mt. Hebron Missionary Baptist Church.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny

Binder, it is my opinion that he does not pose a risk of flight.

MRS. LILLIAN COOK MITCHELL

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Juanita Dyer and I reside at 5403 Milart in Houston, Harris County, Texas. I am over eighteen (18) years of age.

I have known Johnny Binder and his family for approximately 18 years. Johnny refers to me as "Aunt Juanita".

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

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JUANITA DYER

SUBSCRIBED AND SWORN TO BEFORE ME on this the 30th day of December, 1988.

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NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Bonnie J. Binder and I reside in Houston, Harris County, Texas. I am the Vice-President of Diamond Productions. I am over eighteen (18) years of age.

I have known Johnny Binder for approximately 2 1/2 years. Johnny and I have been married since December 14, 1987.

I am aware of Johnny's recent conviction and despite the sentence imposed, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon by knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

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BONNIE J. BINDER

SUBSCRIBED AND SWORN TO BEFORE ME on this the 6th day of January, 1989.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Gerald P. Monks and I reside in Houston, Harris County, Texas. I am the owner of C.A.R.E Bail Bonds, located at 4189 Bellaire Blvd., #201, Houston, Texas. I am over eighteen (18) years of age.

I have known Johnny Binder for approximately two years. I helped arrange Johnny's $500,000.00 bail, which was set in this case.

I am aware of Johnny's recent conviction and, despite the sentence imposed, it is my opinion that if the bond is properly prepared, he will not pose a danger to the community or a risk of flight. The first condition being that the Surety can surrender him anytime the Surety feels he is in contact with drug persons, or fails to comply with

conditions set by the Surety. The Surety will not guarantee to make the bond under any conditions.

GERALD P. MONKS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 30th day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Grant U. Hardeway and I reside in Houston, Harris County, Texas. I am an attorney practicing in Houston and have been an attorney for 15 years. I am over eighteen (18) years of age.

I have known Johnny Binder and his family for approximately 15 years. I have handled various legal matters for Johnny Binder and his family.

On March 6, 1982, I picked Johnny Binder up at the Ellis Unit because he was granted a three day leave to attend his father's funeral. At the time of this release, Johnny was serving an 18 year sentence. On March 8, 1982, Johnny Binder returned himself to the Ellis Unit.

I am aware of Johnny's recent conviction and despite the sentenced imposed, it is my opinion that he does not

pose a danger to the community.

Furthermore, based upon my knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

GRANT U. HARDEWARY

SUBSCRIBED AND SWORN TO BEFORE ME on this the 30th day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Bella Jo Fisher and I reside in Houston, Harris County, Texas. I am a court report in the 230th Judicial District Court for the Honorable Joe Kegans. I am over eighteen (18) years of age.

I have known Johnny Binder for approximately 10 years. My husband, who was a private investigator, was hired by Johnny Binder to do some investigative work in 1979, which was the time Johnny was accused and convicted of a crime he did not commit. Johnny was eventually pardoned for that crime.

I am aware of Johnny's recent conviction and despite the sentence imposed, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge

and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

BELLA JO FISHER

SUBSCRIBED AND SWORN TO BEFORE ME on this the 30th day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Nathalia Binder. I reside at 5406 Burma in Houston, Harris County, Texas. I have been employed at Texas Instruments for over fifteen (15) years. I am fifty-three years of age.

I have known Johnny Binder all of his life as I am his mother.

I am well aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with my son, Johnny, it is my opinion that he does not pose a risk of flight.

_____

NATHALIA BINDER

SUBSCRIBED AND SWORN TO BEFORE ME ON the 23rd day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Sonseria Binder Allen and I reside in Houston, Harris County, Texas.

I am one of Johnny Binder's sisters and I have known him all his life.

I am aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with my brother, Johnny, it is my opinion that he does not pose a risk of flight.

SONERIA BINDER ALLEN

SUBSCRIBED AND SWORN TO BEFORE ME ON the 30th day of December, 1988.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Johnnie Walker and I reside in Houston, Harris County, Texas. I am sixteen (16) years of age and attend Jessie Jones Senior High School. Johnny Binder is my father.

I am aware of Johnny Binder's recent conviction and despite the sentence imposed upon him it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and my relationship with my father, Johnny Binder, it is my opinion that he does not pose a risk of flight.

_____

JOHNNIE WALKER

SUBSCRIBED AND SWORN TO BEFORE ME ON the 25th day of December, 1988.

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NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Rev. Johnnie J. Roberson and I reside in Houston, Harris County, Texas. I am the pastor of Mt. Hebron Missionary Baptist Church and have been for 30 years. I am 70 years of age.

I have known Johnny Binder and his family for over 27 years, as he and his family have been members of my church for over 27 years.

I am aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with Johnny Binder and his family, it is my opinion that he does not pose a risk of flight.

REV. JOHNNIE J. ROBERSON

SUBSCRIBED AND SWORN TO BEFORE ME ON the 25th day of December, 1988.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Marsha Flores and I reside in Houston, Harris County, Texas. I am employed at Texas Instruments and have been for 13 years. I am over eighteen (18) years of age.

I have known Johnny Binder since we were in grade school. We grew up together and we are both members of the Mt. Hebron Baptist Church. My family has ben good friends with the Binder family for over 30 years.

I am aware of Johnny's recent conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based upon my knowledge and relationship with Johnny, it is my

opinion that he does not pose a risk of flight.

MARSHA FLORES

SUBSCRIBED AND SWORN TO BEFORE ME ON the 6th day of January, 1989.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

AFFIDAVIT

My name is Mrs. Willie R. McDonald and I reside in Houston, Harris County, Texas. I am retired from the Houston Independent School District after 34 years of service as a teacher.

I have known Johnny Binder and his family for over 30 years.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

MRS. WILLIE R. MCDONALD

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

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NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Ivi Johnson and I reside in Houston, Harris County, Texas. I am employed as a school teacher for the Houston Independent School District and have been employed for four (4) years. I am 27 years of age.

I have known Johnny Binder for 27 years. We lived in the same neighborhood when we were growing up.

I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

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IVI JOHNSON

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

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NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Cheryl Ann Flores. I reside at 4830 Wilmington, #2 in Houston, Harris County, Texas. I am presently employed at CIGNA Corporation and I am also the Director of Choirs at the Mt. Hebron Baptist Church. I am 35 years of age.

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I am aware of Johnny's conviction and despite the sentence imposed upon him, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

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CHERYL ANN FLORES

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

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NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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AFFIDAVIT

My name is Sylvia Ann Williams and I reside in Houston, Harris County, Texas. I am the secretary of Mt. Hebron Missionary Baptist Church and a Sunday school teacher. I am 33 years of age.

I have known Johnny Binder for over 20 years. I have been a close friend of his sister, Sonseria. The Binder family have been long time members of the Mt. Hebron Missionary Baptist Church.

I am aware of Johnny's conviction and despite the sentence imposed upon him by the Court, it is my opinion that he does not pose a danger to the community.

Furthermore, based on my personal knowledge and relationship with Johnny Binder, it is my opinion that he does not pose a risk of flight.

SYLVIA ANN WILLIAMS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 23rd day of December, 1988.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My Commission Expires:

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ISSUES ON APPEAL

The Defendant-Appellant has numerous issues of law and fact to raise on appeal that would result in a new trial or reversal if decided in his favor. These issues are as follows:

1) The trial court erred in failing to declare a mistrial after the Defendant-Appellant objected to the Clerk of the Court (at the Judge's request) having communicated orally with the jury after the deliberations had begun. After days of deliberation, the Clerk of the Court entered the jury room to deliver a message from the Judge of said Court. The message, essentially, was that if the jury failed to return a verdict

by the end of the following day (Friday), then they may have to work on Saturday. Said communication was not in response to a note from the jury; was not reduced to writing for prior agreement by the parties; and was coercive in nature, designed solely to drive the jury to a verdict.[2]

2) The District Court erred in failing to quash the jury panel after the Government exercised its peremptory challenges based upon the race of the prospective juror. The actions of the Government were in clear

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[2]It should be noted that during ythe three months of trial, the jury was never asked to work on Saturday, prior to the start of deliberations.

violation of Batson v. Kentucky, 476 U.S. 79 (1986).

At the conclusion of the voir dire proceedings, the Defendant-Appellant objected to the composition of the jury and moved to quash the jury as selected. A hearing was held on the Defendant-Appellant's Batson challenge and the Court denied the Defendant-Appellant's motion.

3) The trial court erred in failing to grant the Defendant-Appellant's motion for judgment of acquittal as to Count Twenty.

Count Twenty charged the Defendant-Appellant with maintaining a place for the purpose of using or

manufacturing a controlled substance.

The Court alleged that on or about May 23, 1987, the residence at 8515 Hearth #35 was used to manufacture or use a controlled substance.

The evidence failed to show that any controlled substance was used or manufactured at 8515 Hearth #35, on or about May 23, 1987. The evidence showed only that cocaine was found inside the residence on May 23, 1987, however, there was no testimony that the cocaine was used or manufactured at that address.

Despite the allegation that the Defendant-Appellant possessed that particular

cocaine, the jury acquitted him on that Count.

Count Twenty of the indictment was charged under Title 21 U.S.C. § 856(a), which makes illegal the ". . . opening or maintaining of a place for the purpose of manufacturing, distributing, or use of a controlled substance."

The evidence at trial showed that the purpose of 8515 Hearth #35 was a residence for Cynthia Roberts. There was absolutely no evidence that on or about May 23, 1987, the purpose of this location changed from that of a residence to a manufacturing facility for cocaine. Even if one assumes

the cocaine was manufactured at this location, on this day, this law would not permit conviction. The gravamen of § 856 is the "purpose of" the place which is maintained. The mere cooking or using of the controlled substance at a location will not change the purpose of the residence, unless the intended use of the place is abandoned. The residence, 8515 Hearth #35, was a dwelling where Cynthia Roberts lived, for a period of at least two years. This is not the "fortified crack house" nor "drug laboratory", nor "shooting gallery" that was intended to be dealt with by § 856.

Either the proof is insufficient to sustain a verdict of guilt as to Count Twenty, or Title 21 U.S.C. § 856 is unconstitutional on its face due to vagueness,or it is being unconstitutionally applied in an over-broad manner. Whatever the case, the issues presented are substantial and if decided in the Defendant-Appellant's favor, will result in a new trial of judgment of acquittal.

4) The trial court erred in failing to grant the Defendant-Appellant's motion for judgment of acquittal as to Count Eight.

Count Eight charged the Defendant-Appellant with delivery of a controlled

substance. The proof showed that two co-defendants delivered one ounce of cocaine to an informant who turned it over to a DEA agent. The Defendant-Appellant was not present at the time of the delivery and the informant was never called to testify as to any conversation that he may have had with the Defendant-Appellant. The Defendant-Appellant filed a motion for judgment of acquittal alleging insufficient evidence as to Count Eight.

None of the issues presented are frivolous.